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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. QUENTIN DAMON MURPHY, Defendant and Appellant.	D074702 (Super. Ct. No. RIF1501653)

APPEAL from a judgment of the Superior Court of Riverside County, Thomas E. Kelly, Judge. (Retired Judge of the Santa Cruz Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part and remanded for resentencing.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, and Michael Pulos and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

Quentin Damon Murphy showed up at the workplace of his ex-girlfriend Eva A. and kidnapped her at gunpoint, intending to rape her. When three concerned friends came looking for Eva at Murphy's house, she ran out his front door to escape. Murphy pursued all four, repeatedly reloading and firing his .38-caliber revolver in a residential neighborhood. During the 10- to 15-minute pursuit, he shot one of Eva's friends in his face and struck the homes of two neighbors. Based on these events, a jury convicted him of aggravated kidnapping (Pen. Code, § 209, subd. (b)(1),[1] count 1), four counts of attempted murder (§§ 187, subd. (a), 664, counts 2–5), stalking (§ 646.9, subd. (a), count 6), shooting at an inhabited residence (§ 246, count 7), and various enhancements.

Murphy does not challenge his kidnapping conviction but raises four claims of instructional error as to the remaining counts. We find no error or no prejudice as to each asserted claim. Turning to his sentencing claims, there was no error under section 654 in imposing sentences for counts 6 and 7. Nevertheless, given the passage of Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1−2) Murphy is entitled to resentencing, where the court may consider whether to strike the prior serious felony enhancements (§ 667, subd. (a)). In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Murphy and Eva started dating in January 2014. Their relationship was marred by jealousy issues. Murphy would interrogate her about her social media posts and track her

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1 Further statutory references are to the Penal Code unless otherwise indicated.

whereabouts by following, calling, and texting her. They broke up and reunited several times before Eva ended their relationship in early April 2015. Murphy admitted acting obsessed over the next few days, calling Eva over 60 times and texting incessantly.

On April 4, Eva saw Murphy waiting for her in the parking lot of the grocery store where she worked. She agreed to meet for coffee, and Murphy pleaded with her to add him as a friend to her social media account. That evening, Murphy followed Eva home. At an intersection Eva yelled at him to stop following her and continued driving. Murphy later sent Eva a text message indicating he was watching her from outside the home she shared with her elderly mother and disabled sister.

The next day Murphy met Eva at 6:00 p.m. outside her work to return a bracelet she had left at his house. When she finished her shift two hours later, Murphy was still there. She reluctantly agreed to chat; Murphy again pressured Eva to add him on social media and questioned who she was meeting that evening. Eva told him she had Easter dinner plans with her mother and asked him to leave. Murphy got out of the vehicle, walked to the driver's side window, and again asked her to add him on social media. He asked for a kiss and Eva obliged, hoping it would make him leave.

At that instant Murphy pulled out a revolver, held it to Eva's head and said, "You're coming to my house. You're going to make love to me, then I'm going to kill myself, and then I'm going to set you free." Eva turned off her engine and gave him her keys; Murphy got in the car. Eva asked if she could call her mother, who spoke only Portuguese, to say she would be late. In coded language, Eva instructed her mother to seek help. She then complied with Murphy's instructions and drove to his house on Leah

Lane in Menifee, parking in the driveway. She left her cell phone in the car, hoping authorities would somehow trace her.

Inside the house, Murphy pulled out a suicide note directing his belongings to be delivered to his sister if he died by murder or suicide. He then told Eva he planned to kill her and then himself. For two hours, Eva tried to convince him to let her go, suggesting she could add him back on social media or try to resolve their issues. She locked herself in the bedroom at one point but came out when she feared Murphy would shoot her through the door. She later convinced Murphy to go into the bedroom while she stood in the doorway. She thought if help arrived, she could lock him in the room from the inside to slow his pursuit.

Meanwhile, friends and concerned neighbors of Eva's organized a search team. David T., Gabriel C., and Stephen B. went to Eva's workplace in two vehicles. Unable to spot Eva's car but sighting Murphy's, they decided to go to Murphy's house. Stephen directed them there and the three eventually arrived at Leah Lane. Seeing Eva's car in the driveway, they decided to knock on Murphy's door. None were armed, but David carried a flashlight.

Shortly after 10 p.m., Gabriel knocked on Murphy's front door, and all three yelled out, "Where's Eva?" Murphy yelled out, "What?" from his bedroom window, and the three again asked where Eva was. Hearing commotion, Eva slammed the bedroom door shut, ran out the front door, and screamed, "He's got a gun." Murphy emerged with his revolver and fired multiple shots from his doorstep. Everyone scattered. Eva continued full speed in one direction toward the intersection of Leah Lane and Connie Way with

Stephen running 20 feet behind her. David and Gabriel ran in the opposite direction, toward the terminus of the cul-de-sac on Leah Lane.

David heard bullets whiz by his head. He hid behind a tree two houses down and did not see where the others went. At some point, he heard an additional five shots but could not see what was happening. One of Murphy's neighbors let David in, and he dialed 911. He came outside more than ten minutes later when he heard sirens.

Meanwhile, running from the initial volley of shots, Gabriel had hidden behind a parked car. Things seemed quiet for a bit. He could not drive away because Stephen had the keys to his pickup truck. When he looked up, he heard commotion at the corner of Leah Lane and Connie Way.

That commotion was Murphy in pursuit of Eva and Stephen. They had run from Murphy's home toward Connie Way. Eva fell while running somewhere near that intersection. Murphy, who was five feet away, attempted to fire his gun but was out of ammunition. Eva looked up and saw him reloading a five-shot .38-caliber revolver. She also saw Stephen running back toward Leah Lane and decided to follow him. Stephen saw Gabriel, tossed him his keys, and ran toward the rear of the pickup truck (on the passenger side) with Eva in tow. Gabriel got into his truck and started the engine.

Murphy continued in pursuit, firing shots in the direction of Eva and Stephen. Gabriel decided to hit Murphy with his truck to protect his friends. He missed on the first attempt, and Murphy started reloading his weapon. Believing he would shoot, Gabriel tried again and made contact. Murphy bounced off the truck but jumped up and fired

shots toward Eva and Stephen. Stephen heard Murphy pull the trigger twice; the first shot hit him in the face, but the second chamber was empty.

Gabriel saw Murphy reload and look his way. He decided to hit Murphy again with his truck to dislodge the gun. The truck struck Murphy a second time, but Murphy got up and continued reloading. Gabriel hit Murphy a third time, severing his leg. An injured Murphy continued to fumble with his gun and attempt to shoot. Realizing he needed to try something different, Gabriel stepped outside his car, kicked and punched Murphy, and eventually flung the weapon out of reach. Immobilized by his leg injury, Murphy could not move. Law enforcement and ambulances soon arrived.

During the investigation, deputies discovered bullet holes in two of the neighbors' homes. One penetrated the master bedroom wall of the residence of Amanda L. and Joey M., piercing their closet as they slept inside. At trial, an investigator opined that the hole had been created by the first series of shots fired from Murphy's doorway. This was consistent with Amanda's recollection that a bullet hit her house in the middle of the first string of four or five shots fired. Another hole was discovered in the house next door to Amanda and Joey the following day.

The Riverside County District Attorney charged Murphy by amended information with kidnapping for purposes of rape (count 1), attempted murder of Stephen (count 2), attempted murder of David (count 3), attempted murder of Gabriel (count 4), attempted murder of Eva (count 5), stalking (count 6), and shooting at an inhabited residence (count 7). Various firearm enhancements attached to the counts. As to count 1, it was alleged that Murphy personally used a firearm. (§ 12022.53, subd. (b).) As to count 2, it was

alleged he personally and intentionally discharged a firearm, causing great bodily injury. (§ 12022.53, subd. (d).) As to counts 3, 4, and 5, it was alleged he personally and intentionally discharged a firearm. (§ 12022.53, subd. (c).)

At trial, the prosecution presented testimony from Eva, David, Gabriel, Stephen, Amanda, Joey, and Eva's mother as to what happened the night of April 5, 2015. Testifying in his defense, Murphy offered a starkly different picture. As he recalled, he and Eva were still dating at the time of the incident. Murphy admitted having jealousy issues, following her home against her will on April 4, and making incessant calls and texts in the days leading up to the incident. He met her at her workplace on April 5 but did not threaten her with a gun, demand sex, or say he would kill her. Murphy told Eva about contemplating suicide. He was intoxicated, so Eva offered to drive him home.[2]

Murphy denied forcing Eva inside his house. She went in voluntarily and talked him out of suicide. They were conversing in the bedroom when he heard a knock on the window and someone fumbling with his metal security door. There were three men outside, one who appeared to be holding something. Fearing a break-in, Murphy grabbed his revolver from his dresser drawer. At that same moment, Eva left the bedroom, opened the front door, and ventured out in search of mental health assistance for Murphy.

After Eva ran out, Gabriel stepped inside the open door, asked what Murphy was doing, and threatened to kill him. When Murphy fired, Gabriel took off. Murphy ran

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2 Eva believed Murphy was inebriated when they met in the parking lot. The prosecution's rebuttal witness, a forensic toxicologist, estimated Murphy's blood alcohol level to be between 0.06 and 0.09 percent around 8:30 p.m. and between 0.04 and 0.05 percent around 9:15 p.m.

after Eva to make sure she was safe; he fired warning shots in the air and ground as he approached her and Stephen. He later tripped and shot Stephen by accident. Realizing at that moment who he had shot, he got up to help but was then hit three times by a truck.

The jury convicted Murphy as charged and found all firearm allegations true. It also found he had committed attempted murder in counts 2 through 5 with premeditation and deliberation.

In a bifurcated proceeding, Murphy admitted a strike prior and a prior conviction for a serious felony.[3] (§§ 667, subds. (a), (c), (e)(1), 1170.12, subd. (c)(1).) The court imposed a determinate sentence of 16 years and four months for counts 6 and 7.[4] Running consecutive to that term, the court sentenced Murphy to a total of 170 years to life for counts 1 through 5.[5]

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3 As alleged in the amended information, Murphy was convicted based on a guilty plea to first degree attempted burglary in 2003. At trial, the record indicates that Murphy responded "Yes" when asked, "back in 2003, were you convicted of a felony attempted murder?" This appears to be a typographical error by the reporter. The respondent's briefs make reference at various places to a prior conviction of attempted murder. We grant Murphy's request for judicial notice that his prior conviction (*People v. Murphy* (Super. Ct. Riverside County, 2003, No. SWF005509) was for attempted first degree burglary and not attempted murder. The documents filed with Murphy's request are deemed part of the record on appeal.

4 Setting count 7 as the principal count, the court imposed a five-year middle term, doubled for the strike, and added five years for the "nickel" prior (§ 667, subd. (a)). For count 6, it imposed a consecutive sentence of one-third the middle term, doubled for the strike (16 months). (§ 1170.1, subd. (a).)

5 Counts 1 through 5 each carried a middle term of seven years to life, doubled for the strike, and a five-year sentence for the nickel prior (§ 667, subd. (a)). The firearm enhancements added 10 years to count 1, 25 years to life to count 2, and 20 years each for counts 3, 4, and 5. However, the court stayed the firearm enhancement as to count 4 pursuant to section 654, concluding Murphy fired at Gabriel and David at the same time.

DISCUSSION

Murphy raises four instructional error claims and one sentencing error claim. We address these in turn, finding none meritorious, before discussing Senate Bill No. 1393.

1. *Instructional Error*

Murphy argues his convictions on counts 2 to 5 and 7 should be reversed based on (1) the court's failure to instruct the jury sua sponte on the "Home Protection Bill of Rights" (§ 198.5); (2) the court's instruction that voluntary intoxication could not be considered in determining whether Murphy acted in imperfect self-defense; and (3) the court's failure to instruct sua sponte on the "defense" of accident. Finally, he challenges his convictions on counts 2 through 7, claiming the court failed to instruct sua sponte on unanimity. As we explain, none of these contentions have merit.

a. *Home Protection Bill of Rights (§ 198.5) − counts 2 through 5 & count 7*

Although the court provided several instructions on self-defense, Murphy claims it prejudicially erred by not instructing sua sponte on the rebuttable presumption under section 198.5. To the extent his claim was forfeited by defense counsel's failure to request an instruction, Murphy argues he received ineffective assistance of counsel. Finding no prejudice from the lack of an instruction, we reject his claim.

Titled the "Home Protection Bill of Rights," section 198.5 creates a rebuttable presumption that a person who uses deadly force within his or her residence "held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household" in using that force, provided certain conditions are met. Among the prerequisites, there must be "an unlawful and forcible entry into a residence."

(§ 198.5; *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494–1495, 1497 [entry onto an unenclosed front porch does not suffice]; *People v. Curtis* (1994) 30 Cal.App.4th 1339, 1362 (*Curtis*) [presumption does not apply where "there was no actual entry"].) If the presumption applies, the prosecution bears the burden to rebut it with proof that the defendant "did not have a reasonable fear of imminent death or injury" to himself or a household member when using force against the intruder. (CALCRIM No. 3477.) Murphy testified he fired shots around the same time Gabriel stepped inside his house and threatened him.[6]

At the outset, we question whether there is any basis for a defendant like Murphy, who *does not challenge his conviction for aggravated kidnapping*, to rely on the presumption under section 198.5.[7] Murphy does not dispute the jury's finding that he had kidnapped Eva to rape her (§ 209, subd. (b)(1)) at the moment her friends arrived to rescue her. The Home Protection Bill of Rights was enacted to allow residential occupants to defend themselves from intruders, giving them the benefit of the presumption " 'that the very act of forcible entry entails a threat to the life and limb of the homeowner.' " (*People v. Owen* (1991) 226 Cal.App.3d 996, 1005 (*Owen*).) Considering

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6 This conflicted with Gabriel's account that he never stepped inside Murphy's home before shots were fired.

7 On similar facts, there was no sua sponte duty to instruct on the related concept of defense of habitation in *Curtis*, *supra*, 30 Cal.App.4th 1337. A stalker stole his ex-girlfriend's car, and she went to his apartment to negotiate its return. Her brother and uncle waited outside in case anything happened. The defendant claimed he pulled out a gun to protect himself from the girlfriend's brother, believing he was about to break in and attack him when the gun went off, killing the girlfriend. There was no instructional duty because "no reasonable person in defendant's position would have believed [the brother] was about to break in." (*Id.* at pp. 1361−1362.)

the jury's findings and his position on appeal, any failure to instruct on the presumption was patently harmless because Murphy, as a kidnapper, was not entitled to respond with deadly force.

There are additional reasons too for rejecting prejudice. Jurors received complete instructions on self-defense and defense of others. CALCRIM Nos. 505 and 3470 explained that for these concepts to apply, when Murphy used force he had to reasonably believe that he or Eva was in imminent danger of death or great bodily injury or of being robbed. Both instructions told the jury that Murphy was entitled to stand his ground and defend himself until after the danger had passed. And both made clear that the prosecution bore the burden to prove beyond a reasonable doubt that the attempted killing was not justified. CALCRIM No. 604 further explained the concept of *imperfect* self-defense and again highlighted the prosecution's burden to disprove that theory.[8] Murphy admitted being "obsessed" with Eva in the days leading up to the incident. Multiple witnesses offered consistent testimony as to Murphy's behavior that night. For Murphy to have harbored a reasonable fear of imminent peril, a jury would have to believe the unbelievable—that a kidnapped Eva went in search of mental health assistance for Murphy at 10 p.m., the exact moment three men appeared at the door; that Eva saw the

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8 At least one court concluded similar self-defense instructions covered the same concepts as section 198.5 and eliminated any sua sponte instructional duty. (*Owen, supra,* 226 Cal.App.3d at pp. 1005−1007; but see *People v. Silvey* (1997) 58 Cal.App.4th 1320, 1334 (conc. & dis. opn. of Wallin, J.) [disagreeing with *Owen*].) Because we find no prejudice under any standard, we do not reach Murphy's contention that *Owen* was wrongly decided.

men and ran past them in her quest; and that Murphy fired warning shots in *Eva's* general direction intending to protect her.

Moreover, "what the jury, properly instructed, necessarily found supports the conclusion the error did not contribute to the verdict." (*People v. Merritt* (2017) 2 Cal.5th 819, 832.) Jurors were instructed that attempted voluntary manslaughter was a lesser included offense of attempted murder. By convicting Murphy of the greater offense, it found beyond a reasonable doubt that Murphy was not acting in imperfect self-defense—i.e., he did not actually (but unreasonably) believe that he or Eva was in imminent danger necessitating the use of force. (CALCRIM No. 604.) There is no probability that a jury instructed with CALCRIM No. 3477 on the home protection presumption would have made the anomalous finding that he *reasonably* feared what he did not actually fear.[9] The jury's findings of premeditation and deliberation as to each attempted murder, unchallenged on appeal, further "indicate a complete rejection" of *any* form of self-defense. (*People v. Crandell* (1988) 46 Cal.3d 833, 874.) Under any applicable standard, the failure to instruct jurors on the section 198.5 presumption was harmless.[10]

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9 Murphy argues his attempted murder convictions do not negate prejudice because an instruction based on section 198.5 would have *established* that Murphy held a reasonable fear of imminent peril. To the contrary, an instruction would have merely established a rebuttable *presumption* of that fact.

10 The lack of prejudice also forecloses any ineffective assistance of counsel claim. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 217−218 (*Ledesma*).)

b. *Voluntary intoxication − counts 2 through 5 & count 7*

Murphy claimed he was intoxicated on the night of the incident. During rebuttal, a toxicologist testified that by the time shots were fired, Murphy's blood alcohol content was only between 0.04 and 0.05 percent. The jury was instructed under CALCRIM No. 3426 that it could consider evidence of voluntary intoxication "only in a limited way." The instruction tracked section 29.4, subdivision (b), which allows this evidence to be admitted "solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought."[11]

Murphy argues the court failed to instruct the jury that it could consider evidence of his voluntary intoxication in evaluating whether he had the actual belief in the need to use force, as required for perfect or imperfect self-defense. As he concedes, after he raised this claim in his opening brief, the Supreme Court concluded that "such evidence is not admissible on this question." (*People v. Soto* (2018) 4 Cal.5th 968, 970.) Accordingly, there was no error in the instruction on voluntary intoxication. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

c. *Accident − counts 2 through 5 & count 7*

Murphy next argues that the court prejudicially erred by failing to instruct on the defense of accident. He points to his own testimony that he shot Stephen accidentally

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11 Because voluntary intoxication cannot be considered for general intent crimes (*People v. Atkins* (2001) 25 Cal.4th 76, 81), Murphy cannot assert this instructional error claim as to count 7. (See *People v. Ramirez* (2009) 45 Cal.4th 980, 985, fn. 6 [shooting at an inhabited dwelling is a general intent crime].)

after he stumbled. He suggests the failure to instruct on accident requires reversal as to "at least some" of the charges and firearm enhancements in counts 2 through 5 and 7.

At the outset, any accident instruction could be supported *solely* as to counts 2 and 5 in connection with the shots fired at Stephen and Eva. Murphy claimed he saw them together by Gabriel's pickup truck. Walking toward them, he stumbled and accidentally shot Stephen. By contrast, he testified that the first round of shots fired from his doorway were "warning shots" intentionally fired in the direction of the four and striking Amanda's house.[12]

As Murphy concedes, a trial court has no sua sponte duty to instruct on accident. The "defense" of accident amounts to a claim that the defendant acted without the requisite mental state to form a crime. (*People v. Anderson* (2011) 51 Cal.4th 989, 998.) The firearm enhancements attached to counts 2 and 5 required intentional conduct. (CALCRIM Nos. 3148, 3149.) Jurors were told these counts further required a "specific intent or mental state," requiring them to find that Murphy "intentionally" committed those acts. (CALCRIM No. 252.) Because "the jury received complete and accurate instructions on the requisite mental element of the offense, the obligation of the trial court in each case to instruct on accident extended no further than to provide an appropriate

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12 Murphy suggests his conviction in count 7 could have been based on shots fired at a *different* house at a later point. An investigator testified that bullet marks were discovered on the house next door to Amanda's. Only Amanda and Joey testified at trial, and the prosecution arguably elected to base count 7 on that shooting during closing arguments by mentioning only the damage at Amanda and Joey's home. In any event, even if count 7 could rest on shooting a different house, the jury had to find that Murphy acted "willfully and maliciously"—either implying a complete rejection of accidental conduct. (CALCRIM No. 965.)

pinpoint instruction *upon request* by the defense." (*Anderson*, at p. 998, fn. omitted, italics added.)

Murphy suggests defense counsel's failure to request an accident instruction amounted to ineffective assistance. That claim fails for lack of prejudice. The jury found beyond a reasonable doubt that Murphy attempted the murders of Stephen and Eva with premeditation and deliberation—i.e., after thinking it over in advance and carefully weighing the considerations. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080; CALCRIM No. 601.) "Given the above findings by the jury, it is clear, beyond credible argument, that the jury necessarily rejected the evidence adduced at trial that would have supported a finding to the effect that defendant's 'accident and misfortune' defense . . . was valid, thus implicitly resolving the question of that defense adversely to defendant." (*People v. Jones* (1991) 234 Cal.App.3d 1303, 1315–1316 (*Jones*).) There is no reasonable probability the outcome would have been different had counsel requested an instruction on the accident "defense." (*Strickland, supra*, 466 U.S. at pp. 688, 694; *Ledesma, supra,* 43 Cal.3d at pp. 217−218.)

d. *Unanimity − counts 2 through 7*

Murphy next argues the court erred by failing to sua sponte provide a unanimity instruction with respect to the attempted murder, stalking, and shooting at a residence counts (2 through 7). As we explain, any error was harmless.[13]

In a criminal case, a jury must unanimously agree that the defendant is guilty of a specific crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) This requirement " 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all jurors agree the defendant committed.' " (*Ibid.*) "On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis, or as the cases often put it, the 'theory' whereby the defendant is guilty." (*Ibid*.)

In deciding whether a unanimity instruction is required, its purpose is key. (*Russo, supra,* 25 Cal.4th at p. 1134.) "[T]he trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the

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13 There is a split as to which standard applies. (Compare *People v. Hernandez* (2013) 217 Cal.App.4th 559, 571, 576−577 and *People v. Wolfe* (2003) 114 Cal.App.4th 177, 186−188 [both applying the standard for federal constitutional error in *Chapman v. California* (1967) 386 U.S. 18, 24, reasoning the error lessens the prosecution's burden of proof] with *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [applying the state law standard in *People v. Watson* (1956) 46 Cal.2d 818, 836 because there is no federal constitutional right to a unanimous jury verdict].) The People argue any error was harmless even under the more stringent *Chapman* standard.

exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id.* at p. 1135.)

As the People note, there are exceptions to a court's sua sponte instructional duty. Under the continuous-course-of-conduct exception, no unanimity instruction is required when either: (1) the defendant's acts are so closely connected in time that they form part of one transaction, or (2) when the statute itself contemplates a series of acts over a period of time. (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (*Jennings*).) "Further, the instruction is unnecessary when the defendant proffers the same defense to multiple acts because a guilty verdict indicates that the jury rejected the defendant's defense in toto." (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 572.)

Citing evidence that he fired "multiple shots or series of shots at different times and from different locations throughout the neighborhood," each subject to slightly different defenses, Murphy argues the jury might not have agreed which act formed the basis for his convictions. Specifically, he argues that he fired the shots from his doorway in defense of his home (§ 198.5); around the neighborhood in defense of Eva; at Stephen by accident; and at Gabriel's truck in self-defense.

At the outset, no unanimity instruction was required as to count 6. Section 646.9 itself criminalizes a course of conduct over time. "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to palace that person in reasonable fear for his or her safety . . . is guilty of the crime of stalking . . . ." (§ 646.9, subd. (a).) The word "harass[]" means engaging in "a knowing and willful course of conduct," which in

turn requires "two or more acts occurring over a period of time." (§ 646.9, subds. (e)–(f).) Thus, to convict Murphy of stalking, the jury had to find either that he repeatedly followed Eva *or* that he harassed her through two or more acts. (See CALCRIM No. 1301.)[14] Because either statutory prerequisite covers a conduct over time, no unanimity instruction was required as to count 6. (*Jennings, supra*, 50 Cal.4th at p. 679.)

As to counts 2 through 5 and 7, the People argue Murphy's various shots around the neighborhood formed part of a single transaction, such that jurors would have difficulty distinguishing between them. The entire encounter, from the first shots to paramedics arriving, took between 10 and 15 minutes. During this stretch, Murphy reloaded his revolver multiple times and chased the victims down two residential streets.

Courts have applied the continuous course of conduct exception in somewhat similar contexts, where the jury could not have distinguished between the shots fired. (See *People v. Flores* (2007) 157 Cal.App.4th 216, 223 [defendant "repeatedly fired the gun while standing in one location" and "in a pattern suggesting he was aiming at a moving target"]; *People v. Ervine* (2009) 47 Cal.4th 745, 788 [defendant who engaged in a prolonged shootout from his bedroom window and shot four police officers was engaged in a continuous course of conduct].) Murphy argues his shots over a 10- to 15-

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14 Pursuant to CALCRIM No. 1301, the jury was instructed that the People had to prove that: "1. The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person; AND 2. The defendant made a credible threat with the intent to place the other person in reasonable fear for her safety or the safety of her immediate family." Murphy's suggestion that the *threat* element could be established by either a singular act (pointing a gun) or a course of conduct is immaterial; the first element required repeat conduct.

minute period were not as closely connected in time or place. But in *People v. Percelle* (2005) 126 Cal.App.4th 164, 182, no instruction was required as to a defendant who tried to make two purchases spaced an hour apart using the same fraudulent credit card. Notwithstanding the time lapse, there was "no reasonable basis" for jurors to distinguish between his two attempts. The same could be said here.

In any event, omitting a unanimity instruction was not prejudicial. Despite any slight differences between Murphy's proffered defenses, the jury's findings of premeditation and deliberation on counts 2 through 5 reflect a complete rejection of any theory of self-defense, defense of others, or accident.[15] (*Crandell*, *supra*, 46 Cal.3d at pp. 874−875; *Jones*, *supra*, 234 Cal.App.3d at pp. 1315–1316.)

Crandell, a case the parties do not cite, is on point. A defendant convicted of first degree premeditated and deliberated murder challenged the court's failure to give a unanimity instruction as to which act—shooting or strangling—caused the victim's death. (*Crandell*, *supra*, 46 Cal.3d at p. 874.) Because he did not dispute committing both acts, the only plausible basis for a unanimity instruction was his claim that the self-defense evidence differed as to each. (*Id.* at p. 875.) "Under this hypothesis, a guilty verdict would require unanimous juror agreement on two points: first, that the particular act (either shooting or strangulation) was a cause (either sole or concurrent) of the death of

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15 Regardless of whether the prosecution made an election as to which neighbor's house Murphy shot in count 7, Murphy agrees that the underlying act overlapped with one of the series of shots Murphy fired in the direction of David, Gabriel, Stephen, and/or Eva. Indeed, that is the basis for his section 654 claim.

Ernest and, second, that defendant did not have the privilege of self-defense when he committed the act." (*Ibid*.)

As the court explained, however, even if an instruction was warranted, its omission was harmless. By finding premeditation and deliberation, the "verdicts necessarily imply a complete rejection of all the self-defense evidence presented by defendant." (*Crandell*, *supra*, 46 Cal.3d at p. 875.) We draw the same conclusion here—the premeditation and deliberation findings demonstrate that the jury rejected the various defenses Murphy proffered. Any error in not instructing jurors on unanimity was harmless beyond a reasonable doubt as to counts 2 through 5 and 7.[16]

2. *Sentencing Error*

Murphy asserts two claims of sentencing error. First, he argues the determinate sentences on counts 6 and 7 should have been stayed pursuant to section 654. He also seeks remand for resentencing pursuant to Senate Bill No. 1393. As we explain, we reject the first contention but accept the second.

a. *Section 654*

Murphy argues his stalking conviction in count 6 was based on the same act as his aggravated kidnapping conviction in count 1 (pointing a gun at Eva in the parking lot), and that his conviction for shooting at an inhabited residence was based on the same acts as the attempted murder convictions in counts 2 through 5. Accordingly, he claims the sentences on counts 6 and 7 should have been stayed under section 654.

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16 Because we reject Murphy's instructional error individually, we likewise conclude their cumulative effect does not require reversal. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

Section 654, subdivision (a) states that an "act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute aims " 'to insure that a defendant's punishment will be commensurate with his culpability.' " (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) As a general rule, "[s]ection 654 prohibits multiple punishment for a single physical act that violates different provisions of law." (*People v. Jones* (2012) 54 Cal.4th 350, 358.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*); see *People v. Jones*, *supra*, 54 Cal.4th at p. 372 (conc. opn. of Liu, J.).) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives, which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct." (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1112 (*DeVaughn*).)

If section 654 applies, "the trial court must stay execution of the sentence on the convictions for which multiple punishment is prohibited." (*People v. Correa* (2012) 54 Cal.4th 331, 337.) Whether section 654 applies is a question of fact reviewed for

substantial evidence; the trial court has "broad latitude" in making its determination. (*People v. Buchanan* (2016) 248 Cal.App.4th 603, 611; *DeVaughn*, *supra*, 227 Cal.App.4th at p. 1113.) If no such evidence exists, a sentence is unauthorized and must be corrected on appeal even if no objection was raised below. (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

For count 6, the People rely on an exception to section 654. Where a course of conduct incident to a single objective is divisible in time, offering the defendant a chance to reflect and renew his intent before committing the next offense, multiple punishment is allowed. (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11; *People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) But multiple punishment is allowed even under the general rule: substantial evidence supports the implied finding that Murphy had separate objectives and intents in stalking Eva and kidnapping her.[17]

Murphy admitted following Eva home and incessantly contacting her in the days leading up to April 5. He took notes of her every post and comment on social media to interrogate her about perceived flirting. Once he threatened Eva with a gun, he made a "credible threat," rendering the crime of stalking under section 646.9 complete.[18] Ample evidence supports the implied finding that Murphy's aggravated kidnapping had a different objective—specifically, to rape Eva (§ 209, subd. (b)(1)). That he brandished a

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17 We note that counts 1 and 6 each rest on more than a single act. (*People v. Mesa* (2012) 54 Cal.4th 191, 199 [a court may not find multiple criminal objectives for purposes of section 654 where two convictions were indisputably based on a single act].)

18 During closing arguments, the prosecutor made clear that "the fact that he took out the gun is the threat."

weapon in carrying out these two crimes does not bar multiple punishment under section 654. "Where a defendant is guilty of similar and related crimes committed over a short period of time but nonetheless harbored multiple intents and purposes, sentencing may be imposed on each crime." (*People v. Ibarra* (2007) 151 Cal.App.4th 1145, 1153.) Multiple punishment is proper "even though the violations shared common acts." (*DeVaughn*, *supra*, 227 Cal.App.4th at p. 1112.)

For count 7, the People rely on the multiple-victim exception to section 654. "The defendant who commits an act of violence by means likely to injure more than one person is properly subject to separate punishment." (*People v. McFarland* (1989) 47 Cal.3d 798, 804.) This exception was formulated in *Neal*, *supra*, 55 Cal.2d 11. The defendant in *Neal* threw gasoline into a bedroom window, severely burning Mr. and Mrs. Raymond. He was convicted of arson and two counts of attempted murder, and the trial court imposed concurrent sentences on all three counts. The Supreme Court concluded he could not be sentenced for arson, since it "was merely incidental to the primary objective of killing Mr. and Mrs. Raymond." (*Id.* at p. 20.) But it applied the multiple-victim exception to allow dual punishment for the two attempted murder counts even though both were caused by a single act. (*Id.* at pp. 20−21; see generally *People v. Newman* (2015) 238 Cal.App.4th 103, 113−114 [tracing the origins of the multiple victim exception].)

Neal deemed section 654 inapplicable where " 'one act has two results each of which is an act of violence against the person of a separate individual.' " (*Neal*, *supra*, 55 Cal.2d at p. 21.) Put differently, "even though a defendant entertains but a single

principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim." (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.) This is because "[t]he purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person o*r by a means likely to cause harm to several persons* is more culpable than a defendant who harms only one person." (*Neal*, p. 20, italics added; accord *People v. Oates* (2004) 32 Cal.4th 1048, 1063.)

The People claim multiple punishment is proper for attempted murder and shooting at an occupied house because the victims in the house (Angela, Joey, and their child) were different from those Murphy tried to murder. Murphy responds that the multiple victim exception permitted separate sentences for each attempted murder count but not for shooting at an inhabited house. He likens this case to *People v. Sok* (2010) 181 Cal.App.4th 88, 100 (*Sok*), which suggested in dicta that the trial court properly stayed a sentence pursuant to section 654.

The defendant in *Sok* fired several shots into a car with four occupants, injuring one. He was convicted of attempting to kill the driver and front-seat passenger and with shooting at an occupied vehicle, but the court stayed punishment on the shooting offense. On appeal, the court remarked, "Sok had but a single criminal intent and objective when he shot into Vega's car and attempted to murder both Rocha and Vega," and so the trial court "properly determined under section 654 Sok could not be sentenced for both attempted murder and shooting at an occupied vehicle." (*Sok, supra,* 181 Cal.App.4th at

p. 100.) The People are correct that *Sok* did not analyze the multiple-victim exception. Several courts have applied that exception to allow multiple punishment under similar facts. (See *People v. Dydouangphan* (2012) 211 Cal.App.4th 772, 781 [defendant fired at a truck carrying, killing one]; *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, 1736−1737 [defendant shot into a vehicle carrying four, killing one]; *People v. Masters* (1987) 195 Cal.App.3d 1124, 1128 [defendant fired into a vehicle carrying three, injuring one].)

Closer for our purposes, courts have allowed multiple punishment where a defendant shoots at an occupied building, assaulting one but endangering several. In *People v. Cruz* (1995) 38 Cal.App.4th 427 (*Cruz*), a defendant fired four shots at a security guard standing inside the front glass door; one shot missed the guard's head by inches. (*Id.* at pp. 430−431.) The defendant was convicted of assault with a firearm and discharging a firearm at an occupied building and sentenced for both. (*Id.* at p. 430.) Affirming, the court explained that the multiple victim exception to section 654 applied: the guard was the only victim of the assault, but there were other victims of defendant's shooting at an occupied building. (*Id.* at p. 434 ["Security guard Alvarado, although uninjured, was a victim of both crimes. He was not, however, the only victim of the second crime. The 'children and other people' standing near Officer Alvarado, whom he tried 'to move . . . away' as the bullets shattered the glass front door, were at risk from bullets and flying glass. They too were 'victims.' Appellant was properly punished for his crime against them."].)

The court reached a similar result in *People v. Felix* (2009) 172 Cal.App.4th 1618 (*Felix*). Defendant Felix shot at an occupied house attempting to kill Gomez, the father of his ex-girlfriend. He fired two shots into the master bedroom window, knowing Gomez was home and that two children likely would also be, but unaware that other relatives were visiting. (*Id.* at pp. 1622−1623.) A jury convicted Felix of the attempted murder of Gomez, shooting at an inhabited dwelling, and three counts of assault with a firearm as to Gomez and the two children. The court stayed the assault sentence as to Gomez but imposed sentences on all remaining counts. (*Id.* at p. 1630.)

On appeal, Felix argued that the sentence for shooting at an inhabited dwelling should have been stayed because the conviction was based on the same act as his attempted murder of Gomez. (*Felix, supra,* 172 Cal.App.4th at p. 1630.) The court rejected that claim. Even if he shot at the inhabited residence with the primary purpose of murdering Gomez, there were other people in the house who were victimized by the defendant's actions. (*Id.* at p. 1631.) "Gomez's houseguests were victimized by the shooting into the dwelling but were not named victims in any other count. It follows that the court properly declined to stay the sentence on count 2 (shooting at an inhabited dwelling) because it is governed by the multiple victim exception to Penal Code section 654." (*Ibid.*) The court further noted that "where the crime of shooting at an inhabited residence is involved, a defendant need not be aware of the identity or number of people in the house to be punished separately for each victim." (*Ibid.*, citing *People v. Anderson* (1990) 221 Cal.App.3d 331, 338−339.)

We recognize that our facts differ slightly. Murphy fired at four victims intending to kill them, and in the process struck two nearby residences. He did not shoot Eva or her companions while they were *in* one of those homes. Nevertheless, the location of Murphy's firing spree ensured a greater risk of harm from his actions. "An assailant's greater culpability for intending *or risking* harm to more than one person precludes application of section 654." (*Felix*, *supra*, 172 Cal.App.4th 1618, 1631, italics added, citing *McFarland*, *supra*, 47 Cal.3d at p. 803; see *People v. Brannon* (1924) 70 Cal.App. 225, 235−236 [suggesting in dicta that a defendant who fires a single shot intending to kill A but actually killing B could be separately sentenced for both crimes notwithstanding section 654], accord *Neal*, *supra*, 55 Cal.2d at p. 20.) The trial court did not err in imposing the sentence on count 7.

Murphy argues the multiple victim exception does not apply absent "some additional facts to show that the defendant committed an act of violence against another person." As he notes, the jury was instructed that the prosecution did not have to prove that neighboring homes were inhabited to convict on count 7. (CALCRIM No. 965.)[19] But jurors were *also* given a special instruction modeled after *Cruz*, *supra*, 38 Cal.App.4th at p. 432—i.e., that it could convict if it found that defendant fired at an inhabited dwelling recklessly. Moreover, whether an act of violence has occurred turns

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19 To convict on count 7, the jury was told that the People had to prove: "1. The defendant willfully and maliciously shot a firearm; AND 2. The defendant shot the firearm at an inhabited house; AND 3. The defendant did not act in self defense. . . . A house is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged shooting." (CALCRIM No. 965.)

on the facts as they transpired. (*Newman, supra,* 238 Cal.App.4th at pp. 116−117.) When the bullet penetrated their master bedroom, Angela and Joey were resting inside while their child was sleeping in another room. Sufficient evidence supports the trial court's implied finding that by firing shots in a residential neighborhood after dark, Murphy committed an act of violence against another victim in count 7.[20]

b. *Senate Bill No. 1393*

On September 30, 2018, after briefing in this appeal was complete, the Governor signed Senate Bill No. 1393 into law. (Stats. 2018, ch. 1013, §§ 1−2.) Effective January 1, 2019, Penal Code sections 667 and 1385 permit trial courts to exercise discretion at sentencing to strike or dismiss five-year prior serious felony enhancements in "furtherance of justice." (*Id.* at §§ 1–2.) Previously, courts lacked such discretion. (§§ 667, former subd. (a)(1), 1385, former subd. (b); *People v. Williams* (1987) 196 Cal.App.3d 1157, 1160.)

As the parties agree, this new law applies retroactively to cases not yet final as of January 1, 2019. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–972, citing *In re Estrada* (1965) 63 Cal.2d 740, 744−745.) Given our record, we remand for a full resentencing hearing, at which the court may consider whether to strike Murphy's prior serious felony enhancements under section 667, subdivision (a)(1). (See generally *People v. Buycks* (2018) 5 Cal.5th 857, 893 ["on remand for resentencing 'a full

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20 Because we reject Murphy's central premise that multiple punishment on counts 6 and 7 was erroneous, we also reject his claim that the imposition of sentences on these counts deprived him of procedural due process.

resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances' "].)

DISPOSITION

The matter is remanded for a full resentencing hearing at which the court may in its discretion decide whether to strike the five-year enhancements imposed for Murphy's serious prior felony under section 667, subdivision (a)(1). Upon resentencing, the clerk of the superior court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

DATO, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.